

E. M. asks the Utah Labor Commission to review Administrative Law Judge George's denial of Mr. M.'s claim for permanent total disability benefits under the Utah Workers' Compensation Act ("the Act"; Title 34A, Chapter 2, Utah Code Ann.).

The Labor Commission exercises jurisdiction over this motion for review pursuant to Utah Code Ann. §63-46b-12, Utah Code Ann. §34A-2-801(3) and Utah Admin. Code R602-2-1.M.

### **BACKGROUND AND ISSUES PRESENTED**

While temporarily working as a movie extra for Media on October 28, 1996, Mr. M. injured his cervical spine and right shoulder. On July 31, 2000, he filed an application with the Commission to compel Media to pay permanent total disability compensation for his injuries. Judge George held an evidentiary hearing on Mr. M.' claim on May 3, 2001. On July 15, 2003, Judge George denied the claim on the grounds that Mr. M. remained able to work. Mr. M. now seeks Commission review of Judge George's ruling.

### **FINDINGS OF FACT**

Because Judge George's decision omits relevant facts, but also includes other material that is irrelevant, the Commission makes the following findings of fact regarding Mr. M.'s claim for permanent total disability compensation.

Mr. M. was born on August 21, 1939. He has a high school diploma and attended college for several semesters. He speaks English and Spanish.

On July 1, 1995, after working 28 years as a maintenance specialist for the State of Utah, Mr. M. retired. Nine months later, on March 20, 1996, he accepted employment at a McDonald's fast-food restaurant. His duties included food preparation, mopping and sweeping, and removal of garbage bags weighing between 20 and 35 pounds. His work at McDonald's also involved some unspecified amount of kneeling, stooping and bending.

On October 28, 1996, while Mr. M. was still employed at McDonald's, he accepted additional work as a movie extra for Media. That same day, while working for Media, he slipped and fell on a wet floor. This accident caused: 1) a cervical spine injury that resulted in a 3% whole person impairment;<sup>1</sup> and 2) a right shoulder injury that resulted in a 6% whole person impairment.<sup>2</sup> In addition to these work-related injuries, Mr. M. has a preexisting non-work back injury that accounts for an additional 3% whole person impairment.

Mr. M. reached medical stability from his work-related injuries on approximately September 5, 1997. He then sought to return to work at Media, but no work was available. He also sought to return to light-duty work at McDonald's, but was told no light-duty work was available. Mr. M. did not seek other employment and has not worked since the date of his accident at Media.

Since reaching medical stability, Mr. M. has undergone several medical examinations and evaluations of his ability to work. The results of those examinations are summarized as follows:

- Dr. Casey, Mr. M.'s chiropractor, believes Mr. M. can: 1) occasionally move around on foot; 2) frequently remain in a normal seated position; 3) occasionally lift objects weighing up to 10 pounds and rarely lift object weighing 25 pounds; and 4) occasionally hold, pinch and feel objects with his hands and fingers. However, Dr. Casey does not believe Mr. M. can climb or descend ladders, crawl, or maintain equilibrium on wet, narrow or moving surfaces.
- Dr. McGlothin, an orthopedic specialist, believes Mr. M. is capable of at least light work that could include occasional lifting, pushing or carrying of up to 35 pounds, and repetitive lifting, pushing, and carrying of up to 20 pounds. Dr. McGlothin also concluded that Mr. M. would require the ability to change from sitting to standing every 30 to 60 minutes.
- Cory Davis, a physical therapist, concludes that Mr. M. has the physical ability to perform light work. Mr. Davis also documented substantial symptom magnification on Mr. M.'s part.

For his part, Mr. M. claims he is extremely limited in nearly all movements and exertions. However, Mr. M.'s description of his limitations does not conform to many of the 3<sup>rd</sup> party observations and evaluations in the record, Mr. M.'s previous statements to medical providers, or his description of various activities he has engaged in. On balance, the Commission accepts the evaluations of Dr. McGlothin and Mr. Davis to be the most accurate descriptions of Mr. M.'s true abilities.

Regarding the requirements and opportunities for Mr. M. to return to his past employment in the fast-food industry, such work can include a variety of tasks, including sweeping and mopping, taking orders and delivering food, serving as cashier, mopping, sweeping, general clean-up and removing garbage. Fast-food employers customarily assign these tasks to individual employees according to the employees' respective abilities. Many fast-food employers in the Ogden area have work available for an individual of Mr. M.'s age, physical abilities, education, language skills and previous experience.

### **DISCUSSION AND CONCLUSION OF LAW**

There is no question that Mr. M. suffered accidental work-related injuries to his cervical spine and right shoulder while working for Media on October 28, 1996. He therefore meets the Utah Workers' Compensation Act's general standard of eligibility for benefits, set forth in § 401 of the Act. However, to qualify for permanent total disability compensation, Mr. M. must also satisfy each of the elements of § 413(1) of the Act.

The dispute in this case centers on two of §413(1)'s specific requirements: 1) that Mr. M.' work-related impairments prevent him from doing the essential functions of his prior work; and 2) that he cannot perform other work reasonably available to him, considering his age, education, work experience, medical capacity and residual functional capacity.

Mr. M.' ability to do the essential functions of his prior work. Mr. M. presents the unusual

situation of having worked in three entirely different occupations within 16 months of his accident. Consequently, the first question the Commission must consider is which of these three occupations are relevant in evaluating Mr. M.' ability to do the essential functions of prior work.

While Mr. M. spent the largest part of his work life as a maintenance person, he had retired from that work well before his accident and had no intention of returning to it. Consequently, the Commission does not consider Mr. M.' prior work as a maintenance person relevant to his current claim for permanent total disability compensation. Likewise, even though Mr. M.' accident occurred while he worked for Media as a movie extra, that work was a short-term, one-time event. The Commission does not consider such work relevant to his current claim. In contrast, Mr. M. had been regularly employed by McDonalds for several months prior to his accident. At the time of the accident he expected to continue working at McDonalds. The Commission therefore concludes that Mr. M.' work at McDonalds is the appropriate benchmark for determining whether Mr. M. is able to perform the essential functions of his prior work.

Mr. M. has described his pre-accident work duties at McDonalds as including food preparation, mopping and sweeping, and removal of garbage bags weighing between 20 and 35 pounds. He also reports, without further explanation, that the work included some kneeling, stooping and bending. The preponderance of evidence regarding his current capabilities establishes that he is capable of at least light work that could include occasional lifting, pushing or carrying of up to 35 pounds, and repetitive lifting, pushing, and carrying of up to 20 pounds. Based on this comparison between Mr. M.' abilities and the essential functions of his prior work, the Commission concludes Mr. M.'s work-related impairments do not prevent him from performing such functions.

Mr. M.' ability to perform other work reasonably available. Section 413(1) of the Act also requires Mr. M. to establish that he cannot perform other work reasonably available, considering his age, education, work experience, medical capacity and residual functional capacity. Media has presented persuasive evidence that many employers in the fast-food business have work immediately available for someone with Mr. M.' background and abilities. The fact that each fast-food restaurant has a variety of tasks that must be performed by a crew of several employees allows employers in the industry to accommodate someone with limitations such as Mr. M.. Furthermore, Mr. M.' education and work experience, as well as his language abilities, are characteristics that increase his employability.

Summary. In order to qualify for permanent total disability compensation, Mr. M. must satisfy **each** of the elements established by §413(1) of the Act. As discussed above, the Commission concludes Mr. M. has failed to meet two of those elements. The Commission therefore concurs with Judge George's ultimate conclusion that Mr. M. is not entitled to permanent total disability compensation.

### **ORDER**

The Commission denies Mr. M.'s motion for review and affirms Judge George's denial of Mr. M.'s claim for permanent total disability compensation. It is so ordered.

Dated this 15<sup>th</sup> day of June, 2004.

R. Lee Ellertson, Commissioner

1. The medical panel appointed in this matter characterized Mr. M.'s work-related cervical spine injury as "medically documented injury, persisting symptoms, mild degenerative changes, and permanent activity restrictions."
2. The medical panel characterized Mr. M.'s work-related right shoulder injury as "limitation of ROM (range of motion)" in both adduction and forward flexion.